IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

I.T.R. No. 105 of 1998

DATE OF DECISION: 27.8.2007

The Commissioner of Income-tax, Patiala

…Applicant

Versus

M/s Bharat Medical Store, Bhatinda

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Yogesh Putney, Advocate,
for the applicant-revenue.

JUDGMENT

M.M. KUMAR, J.

At the instance of the revenue the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for brevity, 'the Tribunal'), has referred the following question of law for determination of this Court by exercising jurisdiction under Section 256(1) of the Income-tax Act, 1961 (for brevity, 'the Act'), which is stated to have emerged from order dated 26.11.1997, passed in I.T.A. No. 155(ASR)/1991, in respect of assessment year 1988-89:-

> "Whether, on the facts and in the circumstances of the case, the ITAT was right in law in holding that commission paid by the assessee to the agents is an allowable expenditure?"

Brief facts may first be noticed. The assessee-respondent filed its return of income for the assessment year 1988-89 claiming allowance on commission paid by it to various agents who are stated to be relatives/friends of the partners of the assessee firm. The amount of

commission amounted to Rs. 7,30,939/-. The Assessing Officer disallowed the claim with the observation that the payment of commission was devised by the assessee firm to reduce the tax liability. He also held that the commission was paid to close relations and friends of the partners of the assessee firm.

On appeal before the CIT (A), it was held that although there was no documentary evidence regarding service being done, the assessee firm could not procure business without making payment of the commission. Accordingly, the CIT (A) allowed commission of Rs. 2,82,957/- and sustained addition to the extent of Rs. 4,44,979/-.

On further appeals filed by the parties, the Tribunal allowed the commission paid and reversed the order of the CIT (A), which sustained addition to the extent of Rs. 4,44,979/-. The Tribunal noticed in para 10 of its order that all the agents except one, were examined by the Assessing Officer and he rejected their testimony without properly appreciating the facts of the case. It noticed the terms of the agreement which required the orders to be placed direct to the company by the Government institutions/Public Sector Undertakings but the assessee had to procure the order which in fact were placed direct by the institution with M/s Indian Drugs Pharmaceuticals Ltd. (IDPL). The main job of the assessee firm was that of liaison and the agents appointed by the assessee firm assisted in persuading the institutions to place the order with IDPL and arrange acceptance of supply made by the IDPL. It was to remit the sale price as per the bills raised by the IDPL. Therefore, the agents were instrumental in getting all the terms of the contract between IDPL and the assessee firm complied with and they were appointed for commercial expediency. The Tribunal went on to observe as under:-

> "10. ……To achieve the turnover of Rs. 1,90,37,959/- it has to appoint sales agents to whom it has paid commission on the same patterns as it was receive from IDPL but

retaining ½% for itself. The payment to these agents have been made by Account Payee Cheques and the fact it could not be paid during the assessment year under consideration is also explainable because at the close of accounting year, the IDPL was to pay to the assessee a sum of Rs. 7,77,764/-. The payment to the sales agents were made by cheques so as to avoid disallowance under section 40-A(3) and it is for that purpose that the partners of the assessee firm helped the agents to open accounts in their bank by introducing them and the money paid by the assessee was deposited in the accounts of the agents and from there it was withdrawn for making investment by the agents in FDR's with private parties, purchase of plots etc. and the assessee has furnished a chart of page 48-89 of the Paper Book, which clearly indicate that out of the commission, payments which were made by the assessee firm to the agents and those agents withdrew the amount for making investment with private parties like: M/s R.K. Electrical, Bathinda, M/s Singla General Store, Bathinda, M/s Singla Medical Agencies, Bathinda, M/s Bathinda Diagnostic Centre, Bathinda, M/s Bharat Drug Store, Bathinda and purchase of plots. The Utilisation of the amount by the agentswasless than the commission paid in their a/cs because part of the commission was utilised in for reimbursement payment of the expenditure incurred by the agents for the purpose of the business of the assessee firm. ……"

The Tribunal also observed that the expenditure incurred on payment of commission to the agents was allowable under Section 37 of the Act and for parity of reasoning it relied upon a judgment of Hon'ble the

Supreme Court in the case of **Session J. David and Co. P. Ltd. v. CIT Bombay, (1979) 116 ITR 261**, which interpreted Section 10(2)(xv) of the Act. Accordingly, it held that the expenditure of payment of commission was for the purpose of the assesee's business.

The Tribunal also examined as to whether all the agents were relatives of one partner or the other and concluded that except Mrs. Alka Sharma, who happens to be the wife of Shri Daljeet Sharma, partner, none-else was the relative within the meaning of Section 2(41) of the Act and that the Assessing Officer could have invoked the provisions of Section 40-A(2)(b) of the Act. Accordingly, it has disallowed 1/3rd of the commission paid to Mrs. Alka Sharma treating the same as excessive in terms of Section 40-A(2)(b) of the Act.

After hearing learned counsel for the revenue at a considerable length we have reached the conclusion that the question raised by the revenue is necessarily a question of fact and no question of law would require to be determined by this Court. Whether the agents were close relations/friends of the partners of the assessee firm is necessarily a question of fact and the Tribunal by referring to Section 2 (41) of the Act has found it as a fact that except Mrs. Alka Sharma, who was wife of Mr. Daljeet Sharma, partner, no one else was relative of the partners of the assessee firm. Likewise, there are findings by the Tribunal that the expenditure on payment of commission was for advancing the purpose of the assessee's business and the services of the agents procured by the assessee firm, in fact, helped in persuading the institutions to place order with the IDPL and arrange acceptance of supplies made by the IDPL. Accordingly, a categorical finding has been recorded that the agents were instrumental in getting all the terms of the contract between IDPL and the assessee firm complied with and that the agents were appointed for commercial expediency because the assessee firm was not in a position to cover all 13 districts of Punjab and

Chandigarh left to itself. Therefore, these are questions of fact as has been held by a Division Bench of this Court in the case of **Commissioner of Income-tax v. Ishwar Prakash & Bros., (1986) 159 ITR 843**. Likewise, reliance could be placed on a judgment of Hon'ble the Supreme Court in the case of **Shazada Nand & Sons v. C.I.T., (1977) 108 ITR 358**, wherein it was held that the commission paid to two employees of the assessee firm was reasonable having regard to all the circumstances of the case and was allowable as a deductible expenditure under Section 36 (1)(ii) of the Act. Hon'ble the Supreme Court was dealing with a matter in respect of assessment year 1960-61 to 1963-64.

For the reasons aforementioned, the question is answered against the revenue and in favour of the assessee.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

August 27, 2007

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